

DEC 14 1978

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

**No. 77-1686**

LEO SHEEP COMPANY AND PALM LIVESTOCK COMPANY,  
*Petitioners,*

v.

UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR,  
AND DIRECTOR, BUREAU OF LAND MANAGEMENT,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Tenth Circuit

**Brief of Energy Transportation Systems Inc. as  
Amicus Curiae in Support of Respondents**

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**Brief of Energy Transportation Systems Inc. as  
Amicus Curiae in Support of Respondents**

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Amicus has received and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief in Support of Respondents.

**OPINIONS BELOW**

The opinions below are listed in and appended to the petition for writ of certiorari.

**QUESTION PRESENTED**

Section 2 of the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, created and granted to the Union Pacific Railroad Company a rail-

road right of way. Sections 3 and 4 of said act as amended granted certain odd numbered sections of land, including land now owned by petitioners, to said company to aid in the construction of the railroad. The question presented is whether the grant under Sections 3 and 4 must be deemed to have been made subject to implied easements necessary for access to adjacent even numbered sections of land.

#### STATUTES INVOLVED

The statutes involved<sup>1</sup> are the Homestead Act of May 20, 1862, 12 Stat. 392, ("the Homestead Act") which is set forth in the Appendix hereto, and the Act of July 1, 1862, ch. 120, sections 3 and 4, 12 Stat. 489, 492, as amended by Act of July 2, 1864, ch. 216; Section 4, 13 Stat. 356, 358, ("the Union Pacific Act") which are appended to the petition for writ of certiorari.

#### INTEREST OF AMICUS CURIAE

Energy Transportation System Inc., (ETSI), plans to construct a coal slurry pipeline for transportation of coal from the newly developed coal fields of northeastern Wyoming through the States of Nebraska, Kansas, Oklahoma, Arkansas, and on to Louisiana, which will cost approximately \$1.5 billion dollars.

In furtherance of its corporate purpose, ETSI has been for several years and is now engaged in acquisition of its right of way to construct the pipeline. Such right of way consists of a chain of subsurface easements for the installation and operation of the pipeline.

1. In the view of amicus, the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-1066, is not involved because it is clear from the record that no inclosures, unlawful or otherwise, were constructed.

While the nation's railroads have no objection to more than 1,700 pipelines transporting petroleum products and chemicals under their railroad lines in the subsurface strata of the right of way, such crossings by the ETSI coal slurry pipeline have been opposed by all railroads from Wyoming to Louisiana in both the political arena and the courts. ETSI's coal slurry pipeline must cross under the tracks of numerous railroads, including the Union Pacific Railroad Company ("Union Pacific"). Pipeline crossing permits are commonly issued by Union Pacific to other types of pipelines; the construction and operation of pipelines in no way interferes with railroad operations. Union Pacific has consistently refused to issue to ETSI crossing permits allowing the coal slurry pipeline to be constructed and operated beneath the railroad tracks. In view of this refusal, ETSI has been forced to obtain the necessary crossing easements from adjacent landowners in areas where the Union Pacific does not own the substrata under the railroad right of way.

For the same reason, ETSI has been forced to litigate the question of the validity of its easements with Union Pacific, because judicial confirmation of its title is necessary to ensure the viability of the pipeline project.<sup>2</sup>

Four cases are pending between ETSI and the Union Pacific in the federal courts. Three of these are on appeal to the Court of Appeals for the Tenth Circuit, following judgment in favor of ETSI. *Energy Transportation Systems Inc. vs. Union Pacific Railroad Company*, Case No. 77-1770 (appeal from the United States District Court for the District of Wyoming); *Energy Transportation Systems Inc. vs. Union Pacific Railroad Company*, Cases Nos. 78-1680 and 78-1681 (consolidated appeals from the United

2. Judgment in favor of ETSI has been entered and has become final in 60 lawsuits filed by ETSI against railroads including the Union Pacific to quiet title to ETSI's pipeline easements.

States District Court for the District of Kansas). In the United States District Court for the District of Nebraska, decision is pending on motions by all parties for summary judgment in *Energy Transportation Systems Inc. and Board of Educational Lands vs. Union Pacific Railroad Company*, Case No. CV 77-L-167.

In two of these cases (originating in Wyoming and Nebraska), ETSI's easements were obtained from predecessors in title to even numbered sections of land adjacent to the railroad.<sup>3</sup> At issue in those cases is the nature of the right of way conveyed to Union Pacific by Section 2 of the Union Pacific Act.

The other two cases (originating in Kansas) involve situations where ETSI's easements were conveyed by successors in title to land in odd numbered sections originally granted to the Union Pacific pursuant to Sections 3 and 4 of the same Union Pacific Act. Hence the rights granted by Sections 3 and 4 are at issue in the Kansas cases.

The case at bench involves the construction of the same Union Pacific Act. The success of ETSI's \$1.5 billion project depends upon the above-mentioned cases pending in the lower courts; hence, ETSI's interest in the outcome probably exceeds that of either petitioners or respondents.

Petitioners acknowledge in their brief (Brief of Petitioners, p. 4) that, because they do not own or occupy any part of the right of way granted by the Union Pacific Act, the character of rights granted or reserved therein is not at issue in this case. However, petitioners then proceed to argue that there is no express reservation of any right

3. In the Nebraska case, ETSI's easement was granted by the State Board of Educational Lands and Funds, which holds the fee in the even numbered section involved pursuant to the Act of May 30, 1854, 10 Stat. 277, the Nebraska Territorial Act, and the Act of April 19, 1864, 13 Stat. 47, the Nebraska Statehood Act.

of way in the Union Pacific Act across lands granted under Section 3 of the Act to the railroad. This position is supported by the three railroad amici, which go on to urge that the Union Pacific Act granted "unqualified and absolute title" to the Section 3 lands (Brief of amici Union Pacific et al., p. 10).

The interests of Amicus, noted above involve both Section 2 and also Sections 3 and 4 of the Union Pacific Act. This case involves only Sections 3 and 4, but those sections must be considered in light of Section 2, the balance of the Union Pacific Act, and also the contemporaneous Homestead Act. These matters have not been briefed by the parties or other amici. ETSI wishes to bring to the attention of the Court that for over a century courts have been defining the extent and character of estates in and to the lands granted in the forty mile corridor of the Union Pacific railroad line, including both the even numbered and odd numbered sections, and also the right of way, and that the decisions support Respondents' position that the Union Pacific did not receive "unqualified and absolute title" under the Union Pacific Act.<sup>4</sup>

#### STATEMENT OF THE CASE

Amicus adopts Respondents' Statement of the Case as set forth in the Brief of Respondents in Opposition (pp. 2-4) with the proviso that all references to odd numbered sections of land "which were originally granted by Congress to the Union Pacific Railroad in 1862" should specify that such sections were granted by Sections 3 and 4 of the Union Pacific Act.

4. The most recent decisions are the ETSI cases, *Energy Transp. Systems Inc. v. Union Pac. R.R. Co.*, 456 F.Supp. 154 (D.Kan. 1978); *Energy Transp. Systems Inc. v. Union Pac. R.R. Co.*, 453 F.Supp. 313 (D.Wyo. 1977).

### SUMMARY OF ARGUMENT

The Homestead Act and the Union Pacific Act were two of many Congressional enactments passed during the 1860s to promote and facilitate the settlement of the West. During the same decade, eight other railroad acts were passed,<sup>5</sup> the Oregon Trail was subsidized by land grants (Act of July 4, 1866, 14 Stat. 86), and immigration to the West was encouraged by all means at the Government's disposal, for purposes of settlement. The Homestead Act opened all "public lands" to "any person" who chose to enter and reside thereon for purposes of "cultivation and settlement." After the specified period, entrymen under the Homestead Act received fee simple title to the land and the substrata, including mineral rights, pursuant to patents issued by the United States.

The Union Pacific Act created *defeasible* real property interests which would further the two purposes of the Act. Those purposes were the construction of railroad from the Missouri River to the Sacramento River, and the opening to settlement and development of the lands made accessible by the railroad.

Accordingly, Section 2 of the Act granted "the right of way through the public lands" of a specific width and with necessary space for depots and other facilities. This grant was conditioned upon its use for railroad purposes only, and when such use terminated the land reverted to the United States. Thus the Section 2 right of way was inalienable, and no purpose would have been served by the attachment of the servient estate to the right of way. To hold

5. Act of March 3, 1863, 12 Stat. 772; Act of May 5, 1864, 13 Stat. 64; Act of May 12, 1864, 13 Stat. 72; Act of July 2, 1864, 13 Stat. 356; Act of July 4, 1866, 14 Stat. 87; Act of July 23, 1866, 14 Stat. 210; Act of July 25, 1866, 14 Stat. 239; Act of July 27, 1866, 14 Stat. 292.

otherwise would create a long narrow strip of land of little value, which would have impeded rather than promoted development contrary to the Congressional objective of opening the lands to settlement. Therefore, the right of way included the right to use such portion of the subsurface as was necessary for railroading purposes, but nothing further. No patents were ever issued to the right of way. The right of way granted by Section 2 passed through both even and odd numbered sections. The land in the even numbered sections was largely settled pursuant to the Homestead Act and the land in the odd numbered sections was granted to the Union Pacific by Section 3 of the Union Pacific Act. The owners of the servient estate retained the right to cross under and through the right of way in any manner which did not prevent the use of the right of way for railroad purposes.

Under Section 3, the Union Pacific received a grant of "every alternate section of public land, designated by odd numbers" within specified limits on either side of the "road," for the purpose of "aiding in the construction of the railroad." These grants were also conditional in many respects. First, the grant lands were subject to the right of way created by Section 2. Title did not pass under Section 3 until the "line of said road is definitely fixed." Section 3 required that the lands be sold or disposed of within three years of the completion of the railroad; otherwise they became subject to preemption and settlement in precisely the same manner as the adjacent even numbered sections. This conditional defeasance of the grant was imposed because Congress intended that the lands be sold or otherwise disposed of to "aid in the construction" of the

railroad by providing funds, *and* because Congress desired that the lands be open to public settlement.<sup>6</sup>

Section 6 of the Union Pacific Act provided that the lands were subject to forfeiture in the hands of the railroad if the railroad failed to repay subsidy bonds received pursuant to Section 5 of the Act, or if the railroad at any time failed to keep the road in repair and use, or to transmit telegrams, or to transport mail, troops and munitions.

Section 4 of the Act provided that patents would not be issued to the odd numbered sections until the adjacent forty miles of railroad (reduced to twenty by the 1864 amendment) were actually constructed.

The railroads' assertion that "on its face the Act gave unqualified and absolute title to the granted lands" (Brief of Amici Union Pacific et al, p. 10) is unsupportable.<sup>7</sup> The granted lands were on the contrary subject to defeasance on numerous contingencies—all to ensure that the dual goals of the Act were attained. The Congressional aim obviously was to ensure construction and operation of the railroad, not to confer a bonanza upon the promoters.

Since the main purpose of the Section 3 grant was to enable and require the railroad to sell the lands, Congress must have intended that marketable title would pass to the vendees of the Section 3 lands. It follows that the vendees

6. Congress underestimated the value of the lands granted by Section 3; otherwise it would not have been possible for the railroad to convey vast tracts to wholly owned subsidiaries, such as amicus Union Pacific and still construct the railroad. The question of whether such conveyances were effective to avoid the defeasance imposed by Section 3 is beyond the scope of this brief. It is sufficient to note that Congress terminated the land grant system entirely as soon as the results became apparent. See Cong.Globe, 42d Congress, 2d Sess. 1585 (1872), noting disapproval of the land grants.

7. See text following note 21, *infra*.

would receive the servient estate under the right of way in those areas where the railroad line passed over odd numbered sections, subject to the right of way granted by Section 2. Patentees under the Homestead Act received the same rights in even-numbered sections.

The narrow question in the instant case is whether reasonable surface rights of passage across the section corners of private lands were impliedly reserved by the Union Pacific Act where and for so long as necessary for access to the public domain. If the vendees of the railroad were to take marketable title, as Congress clearly intended, they must have received an implied right of access *to the odd numbered sections* for such period of time as no other means of access existed, e.g., until the construction of public roads. This is true because the Homestead Act contemplated that *the even numbered sections would become private land*, as indeed great portions of them have. Where necessary, access to the odd numbered sections must exist as matter of law, uncomplicated by questions of federal policy in allowing crossing of the public domain. By the same token, the odd numbered sections were granted subject to the reciprocal implied right of passage for access to the even numbered sections. Cases in point have uniformly so held.

## ARGUMENT

### A. Section 2 of the Union Pacific Act Expressly Granted and Reserved a Right of Way Easement Through the Public Lands for the Construction and Operation of the Railroad.

The Union Pacific Act of 1862 must be interpreted in light of its background and purpose. Congressional grants of rights of way for public transportation have been made from the earliest days of the Republic. See generally, P. Gates, *History of Public Land Law Development* (1968) pp. 341-356. In modern times, government has more often ac-

quired, rather than granted rights of passage for the public. In all cases, the general rule is that a way of passage granted or reserved is an easement for the use of the surface of land, and such subsurface use as may be necessary to effectuate the purpose of the easement, e.g., support for the piers of a bridge. *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942); *Himonas v. Denver & R.G.R. Co.*, 179 F.2d 171 (10th Cir. 1949).

For a brief period in our history, such Congressional grants were accompanied by a *separate* grant of certain portions of public land adjacent to the road, canal, or right of way. This practice began in 1823 (Act of February 28, 1823, 3 Stat. 727, Ch. 3) and was first extended to railroads in 1850. Act of September 20, 1850, 9 Stat. 466. During the Civil War, the practice was followed in several railroad acts, including the one at issue here. The last such grant was the Act of March 3, 1871, 16 Stat. 573. By 1872, the House of Representatives resolved that land grants in support of railroads should be discontinued because the public domain should be conveyed to settlers rather than corporations. Cong. Globe, 42d Cong., 2d Sess. 1585 (1872). In 1875, the granting of railroad rights of way without land grants was made an administrative function. Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939, repealed, P.L. 94-579, 90 Stat. 2793. Rights of way granted under the latter act have been uniformly held to be easements. *Great Northern Ry. Co. v. United States*, *supra*.

There is no logical reason to conclude that railroad rights of way granted during the twenty-one years when land grants were also made should have been any different than similar rights of way granted before or after that period.

The granting clause of Section 2 of the Union Pacific Act of 1862 is identical to that of the Act of 1875 ("The right of way through the public lands . . . is granted"), which this Court has construed as granting an easement

only. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that the United States, owner of the land over which the right of way crossed, was the owner of the substrata underlying the right of way, and that the right of way was a mere easement, not a fee. No reason is apparent for a different construction of Section 2 of the Union Pacific Act.<sup>8</sup>

The balance of the Union Pacific Act reinforces this conclusion. Section 4 provides that patents should issue to the land grant lands conveyed by Section 3 "conveying the right and title to said lands to said company on each side of the road." Patents were issued upon completion of the adjacent railroad in forty mile segments (amended to twenty miles by the Act of 1864). Patents to the granted lands were directed to be issued in November, 1874 (see *Platt v. Union Pacific R. R. Co.*, 99 U.S. 48, 56 (1878)), and were subsequently issued. *No patent was ever issued for the right-of-way easement*; only the lands granted by Section 3 were patented pursuant to Section 4. Both the language of the Act and its administrative construction by the Department of the Interior in issuing the patents indicate that Section 2 conveyed only an easement.<sup>9</sup>

Congress has confirmed that the Section 2 right of way is not a fee. The railroad had purported to make conveyances of Section 2 lands to innocent third parties in the latter half of the nineteenth century. Following the decision in *North-*

8. Cf. *United States v. Denver & R.G. Ry.* 150 U.S. 1 (1893), in which this Court compared the purpose of the Act of 1875 and the special act passed to promote the construction at the Denver and Rio Grande Railroad (Act of June 8, 1872, 17 Stat. 339, c. 354), and concluded that "The general and special acts are in no way inconsistent with each other." 150 U.S. at 8.

9. A typical patent to the Section 3 land provided that the "the United States of America . . . do give and grant unto the said Union Pacific Railway Company, and its assigns, the tracts of land . . ." listed therein. Only "mineral lands" were excepted, and the existence of the Section 2 right of way crossing the granted lands is not even mentioned. See patent To Southeast Quarter of

*ern Pacific Ry. v. Townsend*, 190 U.S. 267 (1903), the Union Pacific attempted to disavow these conveyances. To protect the grantees and their successors, Congress passed the Norris Act, 37 Stat. 138, in 1912, "legalizing" the prior conveyances "to the extent . . . [such conveyances] . . . would have been legal or valid if the land involved therein had been held by the [railroad] . . . under absolute or fee simple title" (emphasis added). One cannot ignore this Congressional declaration that the right of way is not and never has been a fee interest.

By the Act of March 8, 1922, 42 Stat. 414, 43 U.S.C. § 912, Congress granted its reversionary interest in all rights of way to the owners of the servient estate. "Whenever public lands . . . have been . . . granted to any railroad . . . for use as a right of way . . . and use and occupancy of said lands for such purposes has ceased . . . all right, title, interest and estate of the United States in said lands . . . shall . . . be transferred to [the owner] of the legal subdivision traversed . . ." (emphasis added) This is a Congressional declaration that all grants of right of way were for use and occupancy only, and that the Union Pacific right of way is no different than any other right of way.

The Section 2 easement has never been treated as having the characteristics of a fee interest. Only fourteen years after passage of the Act, this Court noted that

"It may be conceded that a *railroad company has not power either to sell or mortgage its franchise, or perhaps the road which it has been chartered to build,*

Section 3, Township 11, Range 29, Gove County, Kansas dated February 25, 1897, and recorded in the office of the Register of Deeds of Gove County, Kansas on May 13, 1897 in Book 14, Pages 104 to 113. Nor did patents issued to entrymen under the Homestead Act make any mention of the Section 2 right of way. See patent to the North One Half of Section 2, Township 14, Range 64, Laramie County, Wyoming dated March 29, 1913, recorded in the office of the Register of Deeds, Laramie County, Wyoming on May 22, 1913, in Book 170, Page 155.

without express legislative authority, and this has in some cases been decided. The reason is that such a sale or mortgage tends to defeat the purpose the legislature had in view of the grant of the charter." (emphasis added)

*Platt v. Union Pacific R. R. Co.*, <sup>10</sup> supra, at 57.

Subsequent decisions affirmed that the right of way, being inalienable, was not subject to adverse possession, and was subject to reversion to the government in the event it ceased to be used or held for use for railroad purposes. *Northern Pacific Ry. v. Townsend*, 190 U.S. 267 (1903).<sup>11</sup>

Since the right of way is inalienable and thus lacks the most basic attribute of a fee, no purpose would have been served by Congress granting other attributes of fee ownership, such as an interest in the subsurface under the long narrow right of way created by Section 2. See *Himonas v. Denver & R. G. W. R. Co.*, 179 F.2d 171 (10th Cir. 1949) ("The purpose of the grant was to encourage, not impede the development of the areas along the right of way.") Congress intended that both the odd numbered and even numbered sections be developed and settled. Therefore, a logical interpretation of the Act must conclude that the substrata under the right of way is appurtenant to the

10. The Court held that the railroad could sell or mortgage land grant lands, such action being the express purpose of Section 3 of the 1862 Act.

11. At the time of the *Townsend* decision the concept of a non-appurtenant easement was not known, hence the court referred to the estate it was describing as a "limited fee." This phrase was the source of much controversy, until 1957. In that year, this Court clarified that the "limited fee" was in effect an easement and that "[t]he most that the 'limited fee' cases decided was that the railroad received [under Section 2] all surface rights to the right of way and all rights incident to the use for railroad purposes." *United States v. Union Pacific R. Co.*, 353 U.S. 112 (1957).

servient fee through which the right of way passes.<sup>12</sup> The Union Pacific itself acquiesced in this conclusion for some ninety years. In *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), Record on Appeal Vol. III, p. 37, counsel for the railroad advised the court that:

"We are now claiming *for the first time* that the right of way includes greater rights than those required for railroad purposes." (emphasis added)

This Court found the claim wanting:

"We would have to forget history and read legislation with a jaundiced eye to hold that when Congress granted *only a right of way* and reserved all "mineral interests" it nonetheless endowed the railroad with the untold riches underlying the right of way." (emphasis added)

353 U.S. at 116

Amicus submits that this Court settled the dispute about the nature of the interest created by Section 2 of the Union Pacific Act in 1957. However, in litigation between Amicus and Union Pacific, the railroad has relied upon a dictum in *Great Northern Ry. Co. v. United States*, *supra*. In that 1942 case, this Court held that granting language in the 1875 right-of-way statute (identical to Section 2 of the 1862 Act) created an easement. In dealing with the argument that the "limited fee" cases compelled a different conclusion, the Court observed that:

"When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same Act."

315 U.S. at 278

12. A contrary conclusion would frustrate the purpose of Section 3. See text following note 26, *infra*.

This passage was unnecessary to the decision and deals with a subject, Section 2 of the 1862 Act, with which the Court did not come to grips until 1957. *United States v. Union Pacific Ry. Co.*, *supra*, concluding that the "limited fee" cases involved only surface rights. In the latter case this Court noted that it did not consider the question of subsurface rights under Section 2 of the Act of 1862 in *Great Northern*. 353 U.S. at 119.<sup>13</sup>

**B. Patentees Under the Homestead Act Received a Fee Simple Absolute Including Mineral Rights Subject Only to Statutory Reservation of the Railroad Easement Granted by Section 2 of the Union Pacific Act.**

The Homestead Act of 1862 was the first major opening of the public domain to private acquisition and ownership. It provided that "any person" could enter public lands for the purpose of "cultivation and settlement," and after living on the land for five years (later reduced to three years), could obtain a patent to the land so occupied. The purpose of the Act was nothing less than to people the land with citizens.

In the words of this Court:

"The policy of the Homestead Act . . . looks to a holding for a term of years by an actual settler with a view of acquiring a home for himself. In encouragement of such settlers and none others homesteads have been freely granted by the government."

*Adams v. Church*, 193 U.S. 510 (1904)

13. In any event, the passage is reconcilable with *United States v. Union Pacific Ry. Co.*, *supra*, and with the position of amicus. Upon analysis, it is clear that the railroad did own the substrata under the right of way in odd numbered sections by reason of the grant in Section 3 of the 1862 Act. Read in this light, *Great Northern* is entirely consistent with the subsequent holding of this Court and with the position of amicus that the grant of Section 2 of the 1862 Act created only an easement.

Settlement was a primary goal of Congressional policy toward the western lands. The various railroads authorized during the 1860s, including the Union Pacific, were simply means to that end. This appears from this Court's contemporaneous assessment of the Union Pacific Act in *United States v. Union Pacific R. Co.*, 91 U.S. 72 (1875):

"Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast *unpeopled* territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad for transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, *settlements made where settlements were possible and thereby the wealth and power of the United States largely increased . . .*" (emphasis added)

91 U.S. at 80

The Court of Appeals drew the same conclusion in the instant case:

"It was Congress' intent that lands granted, and certainly lands retained, would eventually be conveyed to private persons who would develop the land and *incidentally* patronize the railroad." (emphasis added)

510 F.2d at 885

It is against this background that the property rights conferred by the Homestead Act and the Union Pacific Act must be assessed.<sup>14</sup> Congress was intent upon peopling the

14. The Homestead Act was repealed by the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2793, because it had served its purpose; no appreciable agricultural public land was left in the lower forty-eight states. The Act remains in effect as to Alaska until 1986.

land with settlers, not with conferring a bonanza on the railroad promoters.

The grants made under the Homestead Act clearly had equal or greater dignity than the rights accorded the railroad corporation. For example, entry on land pursuant to the Homestead Act removed the entered lands from the public domain for the duration of the entry. *Hasting R. Co. v. Whitney*, 132 U.S. 357 (1889).

Section 3 of the Union Pacific Act excluded from the grant to the railroad any lands to which a preemption or homestead claim had attached. Moreover, a valid entry of an odd numbered section within the railroad grant limits before final location of the line gave the entryman a title superior to the railroad. *Nelson v. Northern Pacific Ry. Co.*, 188 U.S. 108 (1902); *Svor v. Morris*, 227 U.S. 524 (1913).

*Nelson v. Northern Pacific Ry. Co.*, supra, is particularly pertinent because it involved the Act of July 2, 1864, 13 Stat. 365, part of the same act which amended the Union Pacific Act. The Northern Pacific and Union Pacific grants were virtually identical. In holding for the entryman, this Court reviewed numerous decisions upholding the rights of settlers against the railroads, and had this to say about the competing interests of the individual claimants and the railroad corporation:

". . . [I]t was deemed important to encourage the settlement of the country along the proposed [railroad] route. . . . Congress knew that if immigrants accepted the invitation of the Government to establish homes upon the unsurveyed public lands, they would do so in the belief that . . . their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

Such was the situation when the Act of July 2, 1864 was passed. Necessarily the act must be interpreted in light of that situation. It should not be so interpreted as to justify the charge that the Government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress had in view only the interests of the company, which, with the aid of munificent grants of lands, was empowered to connect Lake Superior and Puget Sound with a railroad and telegraph line."

188 U.S. at 113-114<sup>15</sup>

The Homestead Act patentees received the servient fee interest in even numbered sections under the right of way created by Section 2 of the Union Pacific Act and similar statutes. The early homestead patents contained no reservation of subsurface rights. Reservation of mineral rights as against homesteaders<sup>16</sup> did not begin to be federal policy until after the turn of the century.<sup>17</sup>

The Act of March 3, 1909, 35 Stat. 844, first provided for the reservation of coal rights from Homestead Act patents. The Surface Patent Act of 1914, 38 Stat. 509, expanded this policy to all non-metallic minerals, and the Stock-Raising Homestead Act of 1916, 39 Stat. 862, provided for the

15. The Court also found the same policy reflected in the statutory relation back rule of the Act of May 14, 1880, 21 Stat. 140.

16. In distinction, Section 3 of the Union Pacific Act excluded all mineral lands from the operation of the Act. The exclusion applies to the right of way. *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957).

17. With the advent of irrigation, the Act of August 30, 1890, 26 Stat. 391, codified as 45 U.S.C. §§ 945-950, provided that subsequent patents should be subject to rights of way for ditches and canals.

reservation of all minerals. Subsequently, development of the reserved rights was addressed by the Mineral Leasing Act of 1920, 41 Stat. 437.

Prior to the reservation policy which began in 1909, patentees received all rights which the government had, including mineral rights. *Longdeau v. Hanes*, 21 Wall. 521 (1874). Even after the 1909 and 1916 Acts became law, a patent issued to a homesteader without an express reservation of minerals operated to convey mineral rights. *United States v. Price*, 111 F.2d 206 (10th Cir 1940). Since the railroad received no mineral rights under Section 2 of the Union Pacific Act (*United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957)) patentees under the Homestead Act received mineral rights whether their entry and patent dated before or after the location of the Section 2 right of way.

In *Northern Pacific Railway Co. v. United States*, 277 F.2d 615 (10th Cir. 1960), it was held that a patent to land adjacent to a canal right of way created by the Act of August 30, 1890, 26 Stat. 391, 43 U.S.C. § 945, carried with it the servient estate under the canal right of way including mineral rights. The statute created a "right of way" for ditches and canals, just as Section 2 of the Union Pacific Act creates a "right of way" for the railroad. The general rule that the servient estate under a railroad or other right of way follows the adjacent fee applies to both statutes. See *United States v. Magnolia Petroleum Co.*, 110 F.2d 212 (10th Cir. 1939).<sup>18</sup>

It must be acknowledged that the patentee's rights were subject to the Section 2 right of way in areas where the right of way crossed homesteaded lands. This is why Sec-

18. The same is true of the lands granted by Section 3. See text following note 26, *infra*.

tion 2 of the Union Pacific Act, unlike Section 3, applies to all public lands, whether or not subject to preemption or homestead claims.<sup>19</sup>

However, it is equally clear that the Section 2 right of way may be crossed by the patentee as necessary for the development and enjoyment of the patented lands (provided such crossing does not interfere with railroad operations). Such is the import of *Northern Pacific R. Co. v. Townsend*, 190 U.S. 267 (1903) and *Himonas v. Denver & R.G.W. R. Co.*, 179 F.2d 171 (10th Cir. 1949).

Hence the patentee is subject only to the right of way grant, and then only to the extent necessary to avoid interference with railroad operations. See *Kansas City Southern Ry. Co. v. Arkansas-Louisiana Gas Co.*, 476 F.2d 829 (10th Cir. 1973).<sup>20</sup>

**C. Sections 3 and 4 of the Union Pacific Act as Amended Granted a Conditional Fee Subject to Construction, Completion and Operation of the Railroad, Payment of Subsidy Bonds and the Expressly Reserved Right of Way Easement Created by Section 2 of Said Act and Subject to the Requirement That the Railroad Sell or Otherwise Dispose of the Lands Granted (Including Mineral Rights).**

**1. THE UNION PACIFIC NEVER HELD UNQUALIFIED OR ABSOLUTE TITLE TO THE SECTION 3 LANDS.**

Much confusion has arisen from sweeping statements to the effect that the Union Pacific received "unqualified abso-

19. If the claim had been perfected, the lands ceased to be public, effective as of the date of entry, and hence could not be burdened by the right of way. See *Christie v. Great Northern Ry. Co.*, 284 Fed. 702 (C.C. Wash. 1922).

20. The decision of the Court of Appeals in the case at bench impliedly recognizes that the right of way, like Section 3 lands, is subject to crossing for access, and this conclusion is correct. In *Northern Pacific R. Co. v. Townsend*, 190 U.S. 267, 272, this Court noted that "Congress must have assumed . . . that . . . as settlements were made, crossing of the right of way would become necessary . . ."

lute title" to lands granted under Section 3 of the 1862 Act.<sup>21</sup>

Amici Union Pacific et al. would have the Court believe that "on its face, the Act gave unqualified and absolute title to the granted lands." (Brief of Amici Union Pacific et al. p. 10). This is incorrect. Congress did not make a simple donative conveyance for the benefit of the railroad promoters. On the contrary, the Section 3 grant on its face was carefully conditioned and made defeasible in certain eventualities, to effectuate the purposes of the Act. Those purposes were to ensure the construction and operation of the railroad and the settlement of the lands so made accessible.

Section 3 granted "for the purpose of aiding in construction of said railroad . . . every alternate section of public land, designated by odd numbers" within specified distances from the road. The purpose of the grant was to enable the railroad to *sell* the lands in order to raise funds for construction. The title was made defeasible if the lands were not sold. Section 3 goes on to provide:

"And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed shall be subject to preemption and settlement, *like other lands*, at a price not exceeding one dollar and twenty-five cents per acre, payable to said company." (emphasis added)

Two points should be made here. First, this condition did not attach to the right of way granted by Section 2, which was subject to defeasance (reverter) only in the

21. Some of this difficulty may be attributable to the dictum in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) which made reference to "outright grants" to the railroads. See text at Note 13, *supra*.

event of abandonment.<sup>22</sup> Secondly, the "other lands" also subject to settlement and preemption are the *even numbered sections* opened to the public by the Homestead Act. This is important because it evidences the intent of Congress to open *all* of the west to settlement, while allowing the odd numbered sections to pass through the hands of the railroad in order to finance its construction. Congress did not anticipate the ingenuity of the railroad which would allow it to retain hundreds of thousands of acres of Section 3 lands (Brief of amici Union Pacific et al. in Support of Petition, p. 5).

This Court was forced to deal with a conflict between the two goals of the Act in 1878, four years after the railroad was completed. In *Platt v. Union Pacific R.R. Co.*, 99 U.S. 48 (1878), the words "disposed of" were construed to encompass hypothecation. The case was a difficult one. Platt, a would-be homesteader, had entered and improved an odd numbered section in 1874, (after the location and construction of the railroad) and attempted to preempt the land in 1878. The railroad had never made any use of the land except to subject it, along with thousands of other acres, to the general mortgage required by the 1864 amendment. The United States intervened in favor of Platt, and three justices dissented, feeling that the land should have been freed from the railroad's grasp. The majority opinion discusses the nature and purpose of the Section 3 grant, and of the goals of the Act:

"Suffice it to say, the purpose of Congress . . . was to obtain the construction of the railroad. For that alone the subsidy bonds were given. *Only for that the grants of land were made.* . . ."

22. See text preceding Note 10, *supra*. The government's right of reverter in abandoned railroad right of way was transferred to the owner of the servient estate by the Act of March 8, 1922, Ch. 94, 42 Stat. 414, 43 U.S.C. § 912.)

"There is always a tendency to construe statutes in the light in which they appear when the construction is given. It is easy to be wise after we see the results of experience. . . . The unforeseen success of the enterprise and the unprecedented rush of emigration along the line of the railroad *have shed new light upon the value of the grants made to the company.* But in endeavoring to ascertain what the Congress in 1862 intended, we must . . . place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances . . . We have been led unhesitatingly to the conclusion that the mortgage executed . . . in 1867 was a disposition of the lands granted by the third section of the Act of 1862, within the meaning of that act. . . ."<sup>23</sup>

"The principal objection urged against the interpretation we have given to the words "sold or disposed of" is that it is repugnant to the government policy of guarding against monopolies of public lands by large corporations or single individuals. It must be admitted that Congress had that policy in view when it declared that the lands not sold or disposed of within three years after the entire road should be completed should be subject to settlement and preemption at a price not exceeding \$1.25 per acre. But this policy was manifestly subordinated to the higher object of having the road constructed and constructed with the aid of the land grant. . . . It is evident Congress thought there might be remnants of the grant, not used in aid of construction of the road . . . and those remnants it undertook to open to settlement and preemption."

99 U.S. at 60, 63, 64, 65

23. The court refrained from deciding whether the lands would become subject to preemption again when the mortgage was retired.

Thus it is apparent that the defeasance with respect to preemption was attached to Section 3 because of the second objective of the Act; settlement of all of the public lands.

Other conditions attached to the grant under Section 3 of the 1862 Act. To begin with, it was burdened by the right of way created by Section 2 of the Act wherever the right of way crossed an odd numbered section.<sup>24</sup>

It has been uniformly held that title did not pass under Section 3 until the route map locating the right of way was filed with the appropriate authorities. See, e.g., *Nelson v. Northern Pacific Ry. Co.*, 188 U.S. 108 (1902); *H.A. & L.D. Holland Co. v. Northern Pacific Ry. Co.*, 214 Fed. 920 (9th Cir., 1914).

Section 5 of the Act provides that the granted lands remaining in the hands of the railroad were subject to forfeiture to the government in the event of nonredemption of the subsidy bonds authorized by that section.

Section 6 of the Act provides that the grant is conditioned upon the construction and use of the railroad for the transportation of troops and munitions and mail; it is implicit that the unsold lands would revert to the government upon failure of the conditions. *United States v. Union Pacific R.R. Co.*, 91 U.S. 72 (1875).

Under Section 17, not only the unsold lands but the railroad itself was to be forfeited to the United States if all construction was not complete within ten years.

Section 4 of the Act provided that patents "conveying the right and title" to the Section 3 lands would be issued to the

24. The right of way itself was subject to crossing when necessary for the use and development of the adjacent lands. See note 20, *supra*.

railroad only after the adjacent portion of the road was constructed.<sup>25</sup>

Subject as it was to these conditions and restrictions Union Pacific never had "unqualified and absolute title" to the Section 3 lands; it received a conditional fee circumscribed in accordance with the twin goals of the Act, construction of the railroad and settlement of the public lands.

## 2. THE UNION PACIFIC COULD ALIENATE THE SECTION 3 LANDS, UNLIKE THE SECTION 2 RIGHT OF WAY.

The Section 3 lands were granted to the railroad for sale to raise money for construction. Obviously, the railroad had not only the right but also was under a compulsion to sell or dispose of the lands. Where the right of way crossed the Section 3 lands, the railroad's grantee necessarily took title subject to the right of way for railroading purposes. With the sale, the servient estate under the right of way passed to the grantee (*Chickasha Cotton Oil Company v. Town of Maysville, Oklahoma*, 249 F.2d 542 (10th Cir. 1957); *United States v. Magnolia Petroleum Co.*, 110 F.2d 212 (10th Cir. 1939)), and the railroad retained (as the Act requires) the right of passage, subsurface support and other uses necessary for railroading. *Kansas City So. Ry. Co. v. Arkansas Louisiana Gas Co.*, 476 F.2d 829 (10th Cir. 1973).

In the words of the case last cited:

"... In our opinion [the railroad] cannot deprive the owner of the servient estate . . . from making use of the land in strata below the . . . substrata which are used or needed by the railroad company and which in

25. As we have seen, no patents were ever issued for the Section 2 right of way.

nowise . . . interferes with the construction, maintenance and operation of the railroad.”

476 F.2d at 835<sup>26</sup>

This result is required by the Act; if the inalienable right of way were to include subsurface interests or other attributes of a fee, it would be to the detriment of the Section 3 lands, which were to be sold to raise money. Congress could not have intended to create an insurmountable barrier preventing passage over or under the right of way, which would impair the value of the granted lands. Cf. *Mackay v. Uinta Development Co.*, 219 Fed. 116 (8th Cir. 1914). Moreover, any construction of the Union Pacific Act which would result in long, narrow unsalable strips of land owned in fee would produce a result contrary to public policy. Such arguments have been consistently rejected. See, e.g., *United States v. Union Pacific Ry. Co.*, 353 U.S. 112 (1957); *Chicago & N. Ry. Co. v. Continental Oil Co.*, 253 F.2d 468 (10th Cir. 1958).

The Act of March 8, 1922, 42 Stat. 414, codified as 43 U.S.C. § 912, further evidences Congressional intent that the servient estate not be burdened unnecessarily with long, narrow strips of land. That act granted the reversionary interest of the United States in the inalienable right of way *to the owners of the servient estate*. In so legislating in 1922, Congress obviously had in mind the common law rule which endures today:

“It is the general common law rule . . . that the servient estate in a strip of land set apart for railroad right of way, highway, or other comparable public purpose, passes with a conveyance of the fee to the abutting . . . tract out of which the right of way was carved . . .”

*Chickasha Cotton etc. Co. v. Town of Maysville, Oklahoma*, supra, at 544.

26. The use upheld was the construction of a pipeline.

Forfeiture conditions to the Section 3 grant were obviously extinguished at the time of conveyance to bona fide purchasers for value. This is true of all conditions relating to action or inaction of the railroad, such as payment of bonds, maintenance of the road, and carriage of mail. Thus Section 5 of the Act calls for forfeiture, in the event the bonds are not redeemed, of only those lands remaining in the hands of the railroad. Again, this result is required by the purposes of the Act. If title in the hands of grantees were subject to forfeiture by reason of events over which they had no control, the grant would not suffice to raise money for the railroad or promote the settlement of the public lands.

It must be noted that only a bona fide purchase for value would defeat these conditions. That question was decided by this Court a century ago in *Platt v. Union Pacific Ry. Co.*, supra:

“We do not say that any mortgage, however small, or manifestly made to evade a bona fide execution of the purposes for which the grants were made, or made to defeat the policy of the government which encourages the sale of public lands to private settlers and guards against the accumulation of large bodies in single hands, would be a disposal as understood by Congress. *It may be conceded it would not be, for it would be in conflict with the avowed object of the grant.*” (emphasis added)

99 U.S. at 64

Hence bona fide purchasers for value received a fee simple interest, subject only to the Section 2 right of way where it crossed the lands in question, and whatever right the Act may have given or reserved “by necessary or fair implication.” See *United States v. Denver & R.G. Ry.*, 150

US 1 (1893)), finding such a standard of construction applicable to federal railroad grants.

It is the question of necessary or fair implication, in light of the foregoing analysis of the statutes, which is the issue in the case at bench.

**D. The Congressional Intent in Enacting the Homestead Act and the Union Pacific Act Was to Promote Rather Than Impede Settlement and Cultivation by Private Ownership of Both Odd and Even Numbered Sections So Necessary Easements for Access Thereto Must Be Implied.**

When Congress passed the Union Pacific Act in July, 1862, it did so in furtherance of the steps which it had recently taken to open the public domain to settlement. The Homestead Act passed on May 20, 1862, opened all of the public domain to settlement and preemption. This is why Section 3 of the Union Pacific Act granted only those odd numbered sections "to which a preemption or homestead claim may not have attached." This is why the Section 2 right of way, to which the checkerboard grants under both statutes were servient, is itself subject to crossing when necessary. *Northern Pacific R. Co. v. Townsend*, supra. This is also the reason why Section 3 lands which remained unsold three years after completion were to become subject to preemption "like other lands." Under both acts, Congress intended that the land be used by the public for settlement. Under both acts, the servient estate under the Section 2 right of way passed to private hands. In the words of the Court of Appeals:

"It was Congress' intent that lands granted, and most certainly lands retained, would eventually be conveyed to private persons who would develop the land and incidentally patronize the railroad." (emphasis added)

510 F.2d at 885

With this background, what did Congress intend with respect to access to the checkerboard? Obviously, it could not have intended that the interlocking sections not be accessible for development. For centuries the common law had opposed restraints on the development of land. The intent of Congress was consistent with the remarks of Chief Justice Glynn in *Packer v. Welsted*, 2 Sid. 39, 82 Eng.Rep. 1244 (1657), who remarked that it would be to the "prejudice of the common weal, that land should lie fresh and unoccupied."

To avoid such impediments to land development, it has long been the law that a conveyance which on its face would create or reserve an otherwise landlocked parcel is deemed to impliedly convey or reserve an easement of necessity for access to the landlocked parcel. *Hancock v. Henderson*, 202 A.2d 599 (Md. 1964).

The courts have dealt with the situation where the need for access becomes apparent subsequent to the conveyance and have held that this does not defeat the easement of necessity; rather, the easement is created at the time of the conveyance and "deferred" until use of the land commences. *Hancock v. Henderson*, supra. The operative fact is that at the time of conveyance, the parcel for which the easement is claimed could not be used without the easement. *Ibid*. Moreover, an easement of necessity is created even though the claimant may have a permissive revocable license for access. *Meredith v. Frank*, 47 N.E. 65 (Ohio 1897). Non-use cannot defeat an easement of necessity. *Hancock v. Henderson*, supra. Because of the underlying policy which leads to creation of easements of necessity, it is uniformly held that such easements must be located so as to impose the minimum burden on the servient estate, and that they terminate with the end of the necessity. See, e.g., *Correy v. Rae*, 58 Cal. 159 (1881).

Therefore, neither the fact that the public domain was open land in 1862 nor the fact that the access problem was not at once apparent nor government policy regarding rights of way across government land are obstacles to application of these rules to the legislation of 1862 here involved. On the contrary, Congress must be deemed to have been aware of these longstanding legal principles.

Indeed, in the instances where this exact problem has previously arisen, courts have found that the grants were intended to reserve easements of necessity by implication to reflect the intent of Congress.

*Mackay v. Uinta Development Co.*, 219 Fed. 116 (8th Cir. 1914), relied upon by the Court of Appeals, is precisely in point and should be followed (neither petitioners nor the railroad amici discuss the case except to state that it "has no relevance," Brief of Amici Union Pacific, et al. In Support of Petition, page 19, note 17, or is "without relevance," Brief of Amici Union Pacific, et al., page 20, note 41).

*Mackay* involved conflict between owners of lands granted by Section 3 of the Union Pacific Act and sheep ranchers seeking access to the interlocking even numbered sections, which were still owned by the Government. The Court concluded that the ranchers were entitled to access:

"The odd numbered Sections touch at their corners and their points of contact . . . are without length or width. If the position of the company were sustained, a barrier embracing many thousand acres of public lands would be raised, insurmountable except upon terms prescribed by it. Not even a solitary horseman could pick his way across without trespassing. In such a situation the law fixes the relative rights of the parties. It does not leave them to the determination of either party. As long as the present policy of the government continues, all persons as its licensees have an

equal right of use of the public domain which cannot be denied by interlocking lands in private ownership."  
116 Fed. at 118

*Herrin v. Sieben*, 127 Pac. 323 (Mont. 1912), overruled in part, *Simonson v. McDonald*, 311 P.2d 982 (Mont. 1957),<sup>27</sup> is also in point and has not been cited by the parties or other amici. The facts were virtually the same as the facts in *Mackay*, except that the odd numbered sections involved were granted to the Northern Pacific by the Act of July 2, 1864, 13 Stat. 356. The grant was identical to the Union Pacific Act. The Supreme Court of Montana noted in *Herrin* that the case was *not* one to be decided under common law principles regarding range animals such as were discussed in *Buford v. Houtz*, 133 U.S. 320 (1890). The stock involved in *Herrin* were *controlled* by a herder and hence the court held that the defendants could not allow them to graze on private lands, but that the lower court erred in not allowing access over the privately held odd numbered sections to the even numbered sections, which, as in *Mackay*, remained in the public domain.

The court in *Herrin* upheld the right of access in these terms:

"The grant by the federal government to the railway company, so far as the question at issue is concerned, does not differ from a grant by one private person to another. It is impossible to gain access to the even numbered sections belonging to the government except by going over some portion of the odd sections. It must follow that there is an implied reservation by the federal government of a way of necessity, not only in favor of the government itself for access to these sections for any use to which it may wish to devote

27. See note 28 *infra*.

them, but also in favor of the private citizens who wish to go upon them for the purpose of making settlements thereon, or to cut timber when they may lawfully do so, or to explore them for mineral deposits, or, finally, to use them for grazing purposes. The contrary view would vest in the railway company a monopoly of all the public lands within the limits of the grant . . . . If the surface is such as to permit it, a way of reasonable width from one government section to another should be fixed in each case at the point where the corners join. If because of the broken character of the surface this should be ascertained not to be practicable in any case, then another way should be selected of such width as may be necessary." (emphasis added)

127 Pac. at 328-329<sup>28</sup>

Thus it is apparent that this is not a case of first impression which requires a conclusion that the Union Pacific Railroad received "unqualified and absolute title" to Section 3 lands granted by the Union Pacific Act. As we have seen, it did not receive such title to either the grant lands or the Section 2 right of way.

Nor is this a case where the Court of Appeals reached a novel and unsupportable conclusion. To the contrary, the decision of the Court of Appeals is entirely consistent

28. In *Simonson v. McDonald*, 311 P.2d 982 (Mont. 1957), the Montana Supreme Court held that reserved easements of necessity had been abolished in Montana where eminent domain rights were available to acquire the use sought, in that case a logging road. *Herrin v. Siebert* was overruled only insofar as it recognized the implied easement doctrine in cases where the eminent domain statute applied. One judge dissented from the overruling of the "carefully considered" *Herrin* decision. The Montana statute did not apply to the *Herrin* case. In any event, *Simonson* casts no doubt upon the rules known to Congress in 1864; *Herrin* is still authority for construing the statute.

with and follows the two cases which first considered this precise question more than sixty years ago.<sup>29</sup>

Amicus submits that this case should be resolved on the basis of these precedents. Such an interpretation of Congressional intent avoids the dilemma which otherwise results when even numbered sections are in private hands.<sup>30</sup> Such a ruling would resolve this case and also necessarily give the successors of the railroad a reciprocal right of access across privately owned even numbered sections, and would benefit private owners of even numbered sections who cannot resort to condemnation as can the government. Thus the purpose of both the Homestead Act and the Union Pacific Act would be served.

### CONCLUSION

Title to the lands in the forty-mile wide corridor through which the Union Pacific Railroad was built were acquired from the United States under two statutes. The Homestead Act of 1862 provided that one could settle upon the even numbered sections of public lands and obtain a patent thereto. This patent was subject to the rights of others for ditches, water rights, and the mining of pre-existing mineral claims. Odd numbered sections were granted to the Union Pacific under Section 3 of the Union Pacific Act and were patented under Section 4 of said Act. Grants of both

29. In *United States v. Rindge*, 208 Fed. 611 (S.D. Cal. 1913), the Court refused to find a way of necessity across land grant lands where alternative ways of access to public lands existed.

30. It may be noted that Congress later expressly addressed the problem in the Act of July 26, 1866, 14 Stat. 253, which granted "the right of way for the construction of highways over the public lands." Conversely, it is of course true that the United States had the power to condemn rights of way across private lands for public purposes. However, when all ownership on the checkerboard is private, neither condemnation nor federal access policy is relevant.

odd and even numbered sections were subject to the railroad right of way easement where the Union Pacific railroad was constructed across them.

The courts have recognized that Congress, in enacting the Homestead Act and the Union Pacific Act, intended to encourage the settlement and cultivation of the public lands and to serve those lands with a transcontinental rail system. An Unlawful Inclosure Act<sup>31</sup> was passed to prevent frustration of this policy. Any argument that the transportation corridors created by the Union Pacific Act were intended then and now to serve as Maginot Lines dividing the country and impeding commerce and transportation in accordance with private policies must be rejected. The same concept advanced in the case at bench by the railroad amici under the legal appellation of "unqualified and absolute title" does equal violence to the intent of the Congress which sat in 1862.

The extent of the rights in the land granted and reserved under the Homestead Act and under Sections 2, 3 and 4 of the Union Pacific Act have been litigated for more than one hundred years. Such litigation has developed a body of law defining the correlative rights of the estates created by Congress. From the very beginning, the courts recognized and followed the Congressional intent of fostering settlement and the free flow of commerce. The only courts which have previously considered the exact question now before the Court have resolved it precisely as did the Court of Appeals for the Tenth Circuit.

31. See note 1, supra.

Therefore, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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(Appendix follows)

## **Appendix**

**May 20, 1862 Chap LXXV.—An Act to secure Homesteads  
to actual Settlers on the Pub-  
lic Domain.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim, or which may, at the time the application is made, be subject to preëmption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided*, That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

SEC. 2. *And be it further enacted*, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is

twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however,* That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided further,* That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any

time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

SEC. 3. *And be it further enacted,* That the register of the land office shall note all such applications on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

SEC. 4. *And be it further enacted,* That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

SEC. 5. *And be it further enacted,* That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government.

SEC. 6. *And be it further enacted,* That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent

with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the maximum of compensation now prescribed by law for any register or receiver: *Provided*, That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing preëmption rights: *And provided, further*, That all persons who may have filed their applications for a preëmption right prior to the passage of this act, shall be entitled to all privileges of this act: *Provided, further*, That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years.

SEC. 7. *And be it further enacted*, That the fifth section of the act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the third of March, in the year eighteen hundred and fifty-seven, shall extend to all oaths, affirmations, and affidavits, required or authorized by this act.

SEC. 8. *And be it further enacted*, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to

which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preëmption rights.

APPROVED, May 20, 1862.